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No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT FORT HOWARD PAPER COMPANY IN OPPOSITION

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BRIEF OF RESPONDENT FORT HOWARD PAPER COMPANY IN OPPOSITION

Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") opposes the issuance of the writ of certiorari sought by the Petitioners to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries* v. *Interstate Commerce Commission et al.*, No. 79-1393 and consolidated cases ("*NARI II* ").

OPINION BELOW

The April 25, 1980 opinion of the Court of Appeals, as clarified by its August 15, 1980 *per curiam* opinion, has not been officially reported since the filing of the Petition For Writ of Certiorari (the "Petition"). These two opinions are set forth in Petitioners Appendices[1] C and B, respectively.

QUESTION PRESENTED

Whether the court below possessed the jurisdiction to revoke rate increases permitted by unlawful Interstate Commerce Commission prescriptive orders, when such revocation was necessary to fulfill the intent of Congress to increase environmentally desirable industrial recycling and when the court below had substantial doubts as to the consistency of the Commission's orders with this Congressional intention, which doubts were expressly corroborated by the Congress in subsequent legislation.

STATUTES INVOLVED

In addition to the statutes cited by Petitioners, the following statute has a direct bearing on their Petition: Section 204 of the *Staggers Rail Act of 1980* ("*Rail Act*"), Pub. L. No. 96-448 §204 (to be codified at 49 U.S.C. §10731(e)) (enacted October 14, 1980). This statute is appended in Addendum A hereto.

STATEMENT OF THE CASE

A. Introduction

In Section 204 of the *4-R Act*,[2] enacted in February 1976, Congress directed the Interstate Commerce Com-

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[1] Hereinafter references to the Petitioners' Appendices will be to "Pet. App. _____."

[2] *Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")*, Pub. L. No. 94-210 §204, 90 Stat. 40 (1976) (codified at 49 U.S.C.A. §10731) (West Pamphlet 1980).

mission (the "ICC" or "Commission") to conduct an investigation into the rail freight rate structure on recyclable commodities and competing virgin resource materials. *Id.* Section 204(a)(1), 49 U.S.C.A. §10731 (West Pamphlet 1980). The statute also specifically imposes the burden of proof in this investigation upon the railroads to affirmatively show that their existing recyclable rate structure is not in whole or in part unjust, unreasonable and discriminatory[3] and ordered that the Commission remove all existing unlawful recyclable rates by February 5, 1977. *4-R Act* Section 204(a)(3).

Section 204 is unique because it is the only provison in the *Revised Interstate Commerce Act* (49 U.S.C.A. §10101 *et seq.*) (West Pamphlet 1980) ("*Act*") that requires the Commission to investigate a particular commodity rate structure. Congress was forced to enact this section because of the repeated failures of the Commission to respond to shipper and consumer requests to conduct a meaningful investigation to determine whether the existing recyclable railroad structure acted to prevent the increased usage of environmentally beneficial recyclables.[4] Though refusing to address this most important of issues, the Commission had no similar reluctance in imposing wholesale increases on recyclable com-

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[3] *Nat'l Ass'n of Recycling Indus., Inc.* v. *ICC, 585 F.2d 522, 528, cert. denied sub nom. Atchison, T. & S.F. Ry.* v. *Nat'l Ass'n of Recycling Indus., Inc.*, 440 U.S. 929 (1979) ("*NARI I*").

[4] *Id.* 585 F.2d at 525-532.

modities in numerous general rate increase proceedings where the burden of proving the unlawfulness of the increases rested with shippers.[5] Through *4-R Act* Section 204, the Congress switched the burden of proof from the shippers to the railroads. This switch created an evidentiary presumption against the lawfulness of the existing rate structures and required the railroads to show that the rate structures were not unreasonable and discriminatory impediments to the long-standing Congressional goal of promoting the increased usage of recyclables.[6]

B. Previous proceedings before the Commission and the D. C. Circuit

Shortly after the *4-R Act* was enacted, the Commission instituted the proceeding mandated by *4-R Act* Section 204, denominating it *Ex Parte No. 319, Investigation of Freight Rates for the Transportation of Recyclable or Recycled Commodities* ("*Ex Parte No. 319*"). Numerous interested shippers, including Fort Howard — a major consumer of wastepaper — participated in these proceedings. The railroads were directed to present probative evidence concerning their recyclable and virgin commodity rate structures.

The evidence supplied by the railroads showed that there existed substantial rate disparities between recyclable products and virgin products and that in many instances the rates for recyclables were well above national averages while corresponding virgin commodity rates were below compensatory levels.[7] Despite the ex-

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[5] *Id.* at 526.

[6] *Id.* at 533.

[7] *Id.* at 529-30.

istence of the wide disparities in rates, the Commission's first decision in *Ex Parte No. 319* found no rate discrimination under *4-R Act* Section 204 and only isolated instances of unreasonableness.[8] On appeal, this decision was unanimously reversed by a panel of the United States Court of Appeals for the District of Columbia Circuit, which held that the Commission had adopted definitions of *4-R Act* Section 204 rate reasonableness and rate discrimination that not only conflicted with the manifest desire of Congress to increase the use of recyclable products but also clearly violated the traditional standards of rate reasonableness and discrimination uniformly applied by the I.C.C. when evaluating non-recyclable rates pursuant to the general provisions of the *Act*.[9] The court then vacated the orders under review, and remanded the proceedings to the Commission for corrective action within a six month deadline.[10] The railroads' subsequent petition for certiorari to review this decision was denied. *See Atchison, T. & S.F. Ry.* v. *Nat'l Ass'n of Recycling Indus., Inc.*, 440 U.S. 929 (1979).

On remand, the Commission took little new evidence but instead relied upon statistical "updating" of data previously supplied by the Railroads. (Pet. App. 9c).[11] Based upon this "revised" record, the Commission

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[8] *Id.* at 530.

[9] *Id.* at 534-541. The *Act* has subsequently been recodified without substantive change. *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337.

[10] *Id.* at 541-543.

[11] The data upon which the Commission made its decisions was severely criticized by Fort Howard and others as understating the magnitude of rate discrimination against recyclables. The court below noted that the carrier-supplied evidence, and the Commission's analysis thereof, "suffer[ed] from various inaccuracies . . .". (Pet. App. 18c), but permitted the ICC to rely on its despite "its admitted defects . . . ." (Pet. App. 19c).

found that where rate disparities existed between recyclables and competitive virgin commodities, these disparities were generally "discriminatory" and unlawful under Section 204 of the *4-R Act*. (Pet. App. 21c). It then established a level of maximum recyclable rate reasonableness at a 180% ratio of revenue to variable cost. (Pet. App. 21c). Since almost all recyclable rates were well below the 180% level, which level vastly exceeds that possessed by all but a very small fraction of overall railroad traffic,[12] the recognized effect of the Commission's second *Ex Parte No. 319* decision was to permit the railroads to raise nearly all recyclable rates by substantial amounts, provided they also raised competing virgin rates to similar levels. (Pet. App. 21c). Despite the Commission admonition not to use its decision as a license to raise recyclable rates, the carriers did just that. (Pet. App. 12c, 21c).

C. The Decision By The Court Of Appeals

On petitions for review filed by Fort Howard and numerous other parties to the Commission's second *Ex Parte No. 319* decision, the D. C. Circuit held that the Commission correctly and lawfully identified the existence of rate discrimination against recyclables. (Pet. App. 21c). However, the court found that the Commis-

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[12] Previous Commission studies show that only 6.5% of all the railroad traffic moves at levels that equal or exceed the 180% ratio. *ICC, The Impact of the 4R Act Railroad Ratemaking Provisions* (Report to Congress dated October 5, 1977). The "full cost" or "fully allocated cost" of providing rail service nationally averages 27% above variable cost. (Pet. App. 10d). The extremity of the 180% figure also becomes apparent when compared with the ICC's regulations which establish a presumption of "market dominance" under 49 U.S.C.A. §10709 (West Pamphlet 1980) where the issue rate equals or exceeds a ratio of revenue to variable cost of 160%! *See* 49 C.F.R. §1109.1(g)(2).

sion's remedy for discrimination which permitted, and had the effect of substantially increasing recyclable rates constituted an unlawful response to the edict of *4-R Act* Section 204. (Pet. App. 21c-24c). The court also held that the Commission's prescription of its maximum standard of reasonableness was arbitrary and capricious. (Pet. App. 24c-27c). Because the railroads had used the Commission's second *Ex Parte No. 319* decision as a basis for taking wholesale increases on recyclable commodities, these increases were ordered revoked, except insofar as they were taken in general rate increase proceedings. (Pet. App. 23c, 27c). In a subsequent *per curiam* decision of clarification, the court stated that its exemption of general rate increases from its revocation order was intended to apply only to across-the-board hikes that evenly affected all commodities and was not intended to include general rate increases where recyclable rates were singled out for disparate treatment. (Pet. App. 2b). The court also again emphasized that any other form of recyclable increase must be held in abeyance pending completion of the remand proceedings. (Pet. App. 2b, 3b). The cause was then remanded to the Commission and the Commission has taken *no* further action as of the date of this filing.

D. Congressional Action Since The Decison Below

In the recently enacted *Rail Act of 1980*, Congress has taken the extraordinary step of establishing the maximum reasonable rate ceiling or "cap" on recyclable rates by statutory prescription.[13] Section 204 of the *Rail*

[13] Under the *Act*, Congress has entrusted the Commission with the general duty to establish, maintain and, where necessary, prescribe just and reasonable railroad rates. It was the breach of this duty that led to the extraordinary remedy of statutory prescription.

Act[14] establishes the maximum "cap" for recyclable rail rates at a level far below that set in the Commission's second *Ex Parte No. 319* decision vacated by the *NARI II* court.[15] Statutory prescription was deemed necessary by the Congress because of the Commission's utter failure to properly implement the intent of *4-R Act* Section 204 and other legislation. As explained by the Senate Commerce Committee:[16]

> This Committee and Congress, through section 603 of the Regional Rail Reorganization Act of 1973 and section 204 of the 4-R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless such rate disparities were cost justified, they were to be eliminated without regard to the railroads' general revenue needs.
>
> The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978 [in *NARI I*]. In response to the court's remand of [sic] the Interstate Commerce

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[14] The text of Section 204 is set forth in Addendum A hereto.

[15] This "cap" is estimated to be placed initially within a 140% to 160% ratio of revenue to variable cost. *See* S. Rep. No. 96-470, 96th Cong. 1st Sess. 34 (1979).

[16] The provision in the Senate Bill before the Senate Commerce Committee (S. 1946, §1130) was adopted with technical changes not relevant here by the Congress in Section 204 of the *Rail Act*. *See* H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 96 (1980). The full text of the Senate Committee's analysis of its recyclable rate provision is set forth in Addendum B hereto.

> Commission recently proposed to place a "cap" on freight rates for recyclables at 180 percent of variable cost [in the second *Ex. Parte No. 319* decision] . . . The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed cap. It is therefore the Committee's belief that after a full 6 years since the clear mandate to remove those economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory [prescription of a lower cap].

S. Rep. No. 96-470, 96th Cong. 1st Sess. 33-34 (1979).

ARGUMENT

In their Petition, the railroads do not argue that the court below erred in finding that the Commission's prescribed remedial standards are unlawful. Instead they contend that the court had no jurisdiction to revoke the substantial recyclable rate increases taken pursuant to admittedly unlawful orders, or to prevent new filings of similar increases, until the Commission issues new findings on remand. The carriers are in effect seeking to retain the fruits of the ICC's errors at the expense of the human environment until the Commission gets around to rectifying its mistakes. The remedial actions taken by the court below to prevent irreparable injury to the environment were clearly within the court's power to fulfill the intent of Congress manifested in Section 204 of the *4-R Act* and the general remedial powers of the court. For these reasons the decision below was the correct one and it certainly does not conflict in any way with the past decisions of this Court.

I. The Lower Court's Decision To Revoke Rates Filed In Response To Unlawful Commission Orders Was Required To Fulfill The Intent Of Congress To Remove Impediments To Increased Industrial Recycling

Decisions of this Court leave no doubt that the primary duty of a court in construing a statute is to follow the intent of the legislature. *See, e.g., Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962); *Flora* v. *United States*, 357 U.S. 63, 65 (1958); *United States* v. *N. E. Rosenbloom Truck Lines, Inc.*, 315 U.S. 50, 53 (1942); *Ebert* v. *Poston*, 266 U.S. 543, 554 (1925). This duty extends to the issuance of orders designed to prevent parties before the court from taking actions that violate statutory provisions and cause irreparable harm. *See, e.g., Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U. S. 800, 819 (1973); *Scripps-Howard Radio, Inc.* v. *FCC*. 316 U.S. 4, 10 (1942); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939). *See also Sharon Steel Co.* v. *EPA*, 597 F.2d 377, 381 (3rd Cir. 1979). The court below was simply following these universally accepted decisions and applying them to the case before it. In the proceeding below, the Commission unlawfully granted the railroads permission to dramatically increase most recyclable rates. This action was in direct conflict with the express wishes of Congress, as set forth in *4-R Act* section 204, "to remove barriers to increased levels of recycling . . . ." *NARI II* at sheet 23 (Pet. App. 23c).

As set forth above at p.4, *4-R Act* Section 204 was intended to create a Congressionally-imposed presumption against the legality of the railroad recyclable rate structure and specifically required the railroads to rebut this presumption. *NARI I*, 585 F.2d at 533. If the peti-

tioners were permitted to maintain the revoked rates, they would in effect be allowed to exacerbate the existing rate discrimination and unreasonableness presumed by Congress to be imbedded in the recyclable rate structure without first having met their burden of proof to overcome this presumed illegality.[17] The unlawfulness of this action is even more blatant where, as was the case below, the Commission found rate discrimination against recyclable commodities. It was for these very reasons that the court below made its revocation order. As explicitly stated by the court in *NARI II*:

> The clear congressional intent behind section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist. Now that the Commission has found unjust discrimination against recyclables, it would surely be ironic for this finding to result in an increase in the rates and 'barriers' for such materials.

(Pet. App. 23c).

Having found that the Commission's decision permitted such unlawful increases, the court simply and correctly ordered these increases revoked as inconsistent with its correct construction of *4-R Act* Section 204 "now twice taken [in *NARI I & II*]." (Pet. App. 1f). Furthermore, the court took particular care in crafting its language of recyclable rate revocation so that only discriminatory or profit-oriented increases were disallowed. Generally applicable increases designed to permit the carriers to recoup increased costs of service were specifically excluded from this revocation order. (Pet. App. 2b). This carefully designed revocation order in-

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[17] This is the same type of unlawful reversal of the burden of proof that was forcefully condemned by the court below in *NARI I*. *See id.* 585 F.2d at 534.

sures that no additional impediment to increased recycling is permitted to exist while the ICC conducts its proceedings on remand. It was clearly necessary to prevent judicial review from becoming "an idle ceremony." *Scripps-Howard Radio, Inc.* v. *FCC*, *supra*, 316 U.S. at 10.

Substantial support for the remedial action taken by the court below comes from Section 204 of the new *Rail Act*. In this new law, the Congress has established a substantially lower "cap" on recyclable rates than the "cap" prescribed in the second *Ex Parte 319* decision. This radical departure from the usual statutory framework, wherein the Commission alone sets rates, was required because the ICC had failed to comply with the intent of Congress as properly construed by the D.C. Circuit in the eyes of the Congress. It bears repeating that Section 204 of the *Rail Act* was necessitated:

> . . . because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside [by the *NARI I* Court] in 1978. . . . [T]herefore . . . after a full six years since the clear mandate to remove these economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory [prescription].

S. Rep. No. 96-470, 96th Cong., 1st Sess. 34 (1979).

The court-ordered revocation of substantial recyclable rate increases clearly forwards the intent of Section 204 of the *4-R Act* as that intent was again underscored in the *Rail Act* and as has been consistently misapplied for years by the ICC.

II. The Actions Taken By The Lower Court Are Clearly Consistent With The Past Decisions Of This Court And The General Principles Of Equity

A. There is no Conflict With Previous Decisions of This Court.

The Petitioners initially attempt to show in sundry ways that the court lacked the power to effectuate the intent of Congress because the "rate increases enjoined by the lower court's order have never been found unlawful by the Commission." (Petition at 11). First of all, this statement is materially misleading because the ICC did find that many of the rate levels applicable to individual recyclable commodities were unlawfully discriminatory. (Pet. App. 23c). Regardless of the fact, however, the court found the need to revoke rate increases required by the ICC's misconstruction of the remedies available to it under *4-R Act* Section 204. This Court has long recognized that judicial constructions of a statute control over conflicting interpretations by administrative agencies. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). This principle is especially compelling where, as here, Congress has specifically found the administrative construction to be patently erroneous. Having found that the Commission's orders constituted unlawful responses to *4-R Act* Section 204 (and this finding is not here assailed by Petitioners), the reviewing court is expressly permitted under the decisions of this Court to revoke rates pending a decision in remand provided:

> the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. *Cf. Virginia R. Co.* v. *United States*, 272 U.S. 658, 673 (1926).

Atchison, T. & S.F. Ry. Co. v. *Wichita Board of Trade, supra*, 412 U.S. at 822 (1973)("*Wichita Board*").[18]

In its decision below, the court found that just such "substantial doubts" existed (Pet. App. 23c), which "doubts" were later corroborated by the Congress itself, which found it necessary to remedy the Commission's breach of its primary jurisdiction to enforce *4-R Act* Section 204 by enacting a special remedial statute that

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[18] In *Witchita Board,* the Court reviewed a decision made by a three-judge court which vacated a final ICC order entered after a Section 15(7)(now 49 U.S.C.A. §10707) (West Pamphlet 1980)) investigation permitting certain railroads to file separate tariff charges for in-transit inspection of grain on grounds that the Commission failed to adequately explain its departure from settled ICC precedents in reaching its conclusions. *Id.* 412 U.S. at 805. The three-judge court also suspended the permitted separate charges. Five members of the Court agreed that the courts possessed the equitable power to revoke rates pending the remand proceedings, but four of these five concluded that the injunction had to be reversed because the facts there, unlike the present case, did not show that the Commission had exceeded its statutory authority, only that it did not adequately explain its actions. *Id.* at 822. The three members of the Court dissenting from the conclusions of the majority on the existence of the equitable power to enjoin carrier rate filings did so on the ground that the exercising of this power by the lower court would have unlawfully lengthened the seven-month suspension period under then §15(7). *Id.* at 828. Lengthening of the suspension period is not an issue in the present case.

The *Wichita Board* conclusions concerning the equitable power of the court to revoke rates find substantial support from previous decisions which hold that where an agency has exceeded its statutory authority, "[t]his Court *cannot lightly infer* that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated power. *Cf. Harmon* v. *Brucker,* 355 U.S. 579; *Stark* v. *Wickard,* 321 U.S. 288; *School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94." *Leedom* v. *Kyne,* 358 U.S. 184, 190 (1958) (emphasis added). Lower federal courts have similarly held that "administrative remedies may be bypassed . . . if . . . the agency has clearly violated a right secured by statute. . . ." *Borden, Inc.* v. *FTC,* 495 F.2d 785, 787 (7th Cir. 1974).

virtually stripped the Commission of all its "discretion" in establishing maximum recyclable rate levels. As a result, the actions taken by the court below were unquestionably proper and lawful.

In seeking to undermine the clearly lawful actions taken by the court below, the Petitioners misapply the decisions of this Court in order to produce a conflict of decisions which does not exist. To establish this "conflict," the Petitioners rely on four decisions of this Court. (Petition at i). They are: *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Aberdeen & R. R.R.* v. *SCRAP,* 422 U.S. 289 (1975); *Aberdeen & R. R.R.* v *SCRAP*, 414 U.S. 1035 (1973) and *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). This reliance is misplaced. The *Seaboard Allied* case is irrelevant. It holds that Commission decisions not to suspend or investigate rate changes are judicially unreviewable. In contrast, in the proceedings below, the Commission issued final orders *prescribing* specific recyclable rate levels. Commission rate prescription orders are clearly reviewable. *See State of New York* v. *United States*, 331 U.S. 284 (1947).

While not irrelevant, the *Arrow* and *SCRAP* cases to the extent they are applicable not only do not constitute adverse precendent against the actions taken by the court below, they support it. In the pertinent part of the *SCRAP* cases, the Supreme Court vacated a preliminary injunction issued by a three-judge court to restrain implementation of pre-*4-R Act* recyclable rate increases which had not been found unlawful in an ICC investigation conducted under 49 U.S.C. §15(7) (as now recodified at 49 U.S.C.A. §10707) (West Pamphlet 1980)). *Id.* 422 U.S. at 290. In summarily vacating the injunction, the Court expressly remanded the case for the lower court's "further consideration in light of Atchison,

Topeka and Santa Railway Co. v. Wichita Board of Trade 412 U.S. 200 (1973)." *Aberdeen & Rockfish* v. *SCRAP*, 414 U.S. at 1035. As shown above, the *NARI II* court's decision fully complies with the *Wichita Board* decision and, therefore, does not run afoul of the holdings in the *SCRAP* cases.

In *Arrow,* the Court refused to vacate a district court decision not to enjoin carrier rates which the ICC was still investigating at the time the requested injunctive relief was presented to the lower court. The *Arrow* Court took great care in limiting its holding to the non-final agency action before it and did "not reflect in any way . . ." (*id.* 372 U.S. at 671) upon the power of the courts to exercise "recognized" (*id.*) general equitable powers in reviewing final ICC orders "through the prescribed statutory channels." (*Id.*) The existence of the power to enjoin the implementation of rates issued pursuant to "final" ICC decisions was subsequently recognized in the *Wichita Board* decision, which cited *Arrow* to support its holding.

The related carrier argument that the court lacked jurisdiction to revoke rates "not before the court" is equally erroneous. In *Ex Parte No. 319*, the Commission was adopting decisional rules concerning recyclable rate reasonableness and discrimination which it could then apply prospectively to general and selective carrier rate increase proceedings (Pet. App. 21c). The unlawfully devised standards were being applied prospectively[19] and the prospective relief granted by the court was essential to the fulfillment of the mandate of *4-R Act*, Section 204. No decision of this Court precludes this necessary result.

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[19] *See, e.g., Ex Parte No. 368, Increased Freight Rates and Charges — 1979* (Decided October 5, 1980) (unprinted) (ICC relies on standards developed in *Ex Parte 319* proceedings to evaluate lawfulness of proposed general rate increase as applied to recyclable commodities).

Thus, the purported decisional conflict alleged by the Petitoners simply does not exist.

B. The Equities Clearly Required the Rate Relief Accorded Recyclable Shippers.

The Petitioners alternately argue that the court below erred in ordering its rate relief to recyclable shippers because it did not consider the revenue needs of the railroads, which they assert are the "only public interest" at issue in the proceedings below (Petition at 17). This argument is patently absurd. Both the Congress (*see, e.g.,* Addendum B hereto) and the Commisssion (*see, e.g.,* Pet. App. 7d, 41d) have recognized that unreasonable and discriminatory freight rates on recyclable commodities discourage the increased usage of recyclables. *This* is the critical public interest at stake in the proceedings below, a fact that was specifically set forth in the court below's *NARI II* opinion (Pet. App. 23c) and which the court sought to shield from irreparable injury. Furthermore, the carriers make no attempt to show whether their cited revenue loss (which constitutes only a tiny fraction of their total annual income) makes the recyclable traffic unprofitable.[20]

Collaterally, the Petitioners contend that there was no substantial likelihood that the recyclable shippers would succeed in having the Commission declare the revoked rates unlawful. Any doubts on this score were put to rest by the new *Rail Act* wherein the Congress was forced to lower recyclable rates because the Commission failed to properly implement its previous directive in Section 204 of the *4-R Act*.

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[20] In any event, Section 204 prohibits asserted carrier revenue need from being used to defeat removal of unlawful recyclable rate structures. *See NARI I,* 585 F.2d at 534 n. 62.

CONCLUSION

The Petitioners contend that the lower court's action represents "a striking departure from the Act's principle that railroads are always free to initiate new rates." (Petitition, p. 7). Yet, such a "striking departure" is exactly what Congress intended through its specific statutory directive in *4-R Act* Section 204. Unlike other *Act* rate sections, Congress expressly required the railroads to prove that the existing recyclable rate structures were not lawful. The combined failure of the railroads and the Commission to adhere to the Congressional intent in *4-R Act* Section 204 necessitated the lower court's revocation order and ultimately caused the Congress to employ the extraodinary action of statutory prescription. In the final analysis, both the lower court's revocation order and the subsequent Congressional actions were necessitated by the special and unique character of *4-R Act* Section 204 and the abject failure of the petitioners and the Commission to adhere to it. There is no need for this Court to review the correct and necessary relief granted by the court below.

WHEREFORE, for all the reasons discussed herein, Fort Howard respectfully urges that this Court deny the petition for writ of certiorari. In the event the writ is granted, the Petitioners' request for summary reversal should be denied and the case set for full briefing and argument.

Respectfully submitted,

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ADDENDUM A

Section 204 Of The Rail Act Of 1980

Transportation of recyclable materials

Sec. 204. Section 10731 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection."

ADDENDUM B

S. Rep. No. 96-470, 96th Cong. 1st. Sess. At 32-33 (1979):

Transportation of recyclable commodities

Section 113.—This section places an upper limit on rates to be found reasonable for recyclable commodities that would equal the level established under section 102 of the bill. This level would be recomputed each year by the Commission, and the maximum level of reasonableness for recyclables would be adjusted to reflect the annual adjustments under section 102.

It has been an established national policy, since at least 1965, to encourage and assist in the development and promotion of the collection, transportation, processing and industrial utilization of recyclable materials. Beginning with the Solid Waste Disposal Act of 1965, Congress directed the Environmental Protection Agency to investigate the effects of existing Federal programs and policies on industrial recycling and to recommend what might be done to eliminate or moderate all Federally sponsored disincentives to the reuse, recycling and conservation of materials.

In 1970 Congress passed two additional statutes, the National Environmental Policy Act and the National Materials Policy Act. Together these acts reinforced the National Policy on recyclable materials by directing all Federal agencies to use every practicable means to enhance the quality of renewable resources and to obtain maximum recycling of depletable resources. Additional legislation expressing this national policy include the Resource Conservation and Recovery Act of 1976, the National Energy Conservation Policy Act of 1978, and the Energy Tax Act of 1978.

The freight rate issue has been a key in legislation attempting to encourage increased recycling as a way to mitigate the problem of energy and resource conservation. Rail freight rates are an important factor in the economics of recycling. Often the rates on these commodities equal or substantially exceed the value of the recyclable materials and thereby make it economically impossible for these materials to be marketed

competitively. This is inconsistent with the national interest incorporated in and comprise the focal point of the energy resource legislation described above.

This Committee and Congress, through section 603 of the Regional Rail Reorganization Act of 1973 and section 204 of the 4R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless such rate disparities were cost justified, they were to be eliminated without regard to the railroads' general revenue needs.

The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978. In response to the court's remand of the Interstate Commerce Commission recently proposed to place a "cap" on freight rates for recyclables at 180 percent of variable cost. At the time this "cap" was imposed it exceeded the average revenue/variable cost level for all traffic moving by rail by 53 points, the rebuttable market dominance presumption under the Commission's rules by 20 points and approximately 30 points above the reasonable levels that would be fixed by section 102 of S. 1946. The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed cap. It is therefore the Committee's belief that after a full 6 years since the clear mandate to remove those economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory proscription.

The Committee's provision is quite simple: it merely reduces the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to the ratio level established by section 102 of S. 1946.

At the estimated level of 140 percent to 160 percent, to be established under this section, the railroads would receive revenues that exceed their variable costs by 40 percent to 60 percent and at that level they should be able to make a profit on this recyclable traffic. At this level, neither the railroads nor any other traffic will be "subsidizing" recyclables. This traffic will be paying its full way — including all costs, plus a reasonable rate of return to the railroads.

It is the Committee's intent that the railroads be afforded their full cost plus a reasonable return on the movement of recyclables and therefore the applicable ratio under this provision will be recomputed by the Commission each year, just as the same ratio is to be recomputed annually under section 102 of the bill. This level, however, will represent a "maximum level of reasonableness" for recyclables, and as long as rates charged for the transportation of these materials of such vital importance to the United States are at this level, there can be no further rate increases above such revenues to variable cost ratios.